

identifying case details to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5

FILE:

EAC 04 043 51531

Office: VERMONT SERVICE CENTER

Date: MAY 03 2005

IN RE:

Petitioner:
Beneficiary

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

R Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional documentation.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 6, 2001. The proffered wage as stated on the Form ETA 750 is \$76,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of July 1998.

On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of 301,555, and to currently employ seven workers. The petitioner did not list its net annual income. In support of the petition, the petitioner submitted its 2000, 2001 and 2002 U.S. Income Tax for an S Corporation. The tax returns reflect the following information for the following years:

	2000	2001	2002
Net income	\$7,236	\$10,983	(\$7,083)
Current Assets	\$4,849	\$3,973	\$2,006
Current Liabilities	\$3,850	\$2,425	\$2,601
Net current assets	\$999	\$1,548	(\$595)

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 6, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of Forms W-2 Wage and Tax Statements reflecting wages paid to the beneficiary in 2001 and 2002.

In response, the petitioner submitted the requested Forms W-2 reflecting that it paid the beneficiary \$36,455 in 2001 and \$24,180 in 2002, less than the proffered wage. The petitioner also submitted a letter from its president, [REDACTED], asserting that the petitioner "is ready and willing to offer [the beneficiary] the salary of \$76,000 per annum as compensation." Finally, the petitioner submitted a letter from its accountant, [REDACTED]. Mr. [REDACTED] asserts that the petitioner's tax returns reflect its ability to pay the proffered wage if the officer's compensation and depreciation are added to the petitioner's net income.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 9, 2004, denied the petition. On appeal, counsel reasserts that the net income figure does not reflect the petitioner's financial situation without adding back the depreciation and officer compensation. Counsel further asserts that the beneficiary's income in 2001 and 2002 was low because she did not work for the full year. The petitioner submits bank documents, the beneficiary's passport, a letter from the petitioner's payroll processing service, evidence of the sole owner's income and evidence already in the record of proceedings.

In a letter dated March 26, 2004, [REDACTED] Bank confirms that the petitioner maintains a balance of \$70,160.38. In a letter dated April 2, 2004, the same bank confirms that the petitioner has two lines of credit with bank, for \$64,000 and \$100,000. The bank does not indicate how long the petitioner has had these lines of credit. The bank statements for 2001 and 2002, account [REDACTED] reflect balances between \$15,155 (July 31, 2002) and \$71,081 (April 30, 2001).

In calculating the ability to pay the proffered salary, Citizenship and Immigration Services (CIS) will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the

petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Moreover, while the petitioner did end 2001 with a balance of \$45,707.13, any of those funds spent on the proffered wage in 2001 would not be available in 2002. The petitioner's balance as of December 31, 2002 was \$29,038.33. Thus, not only did the petitioner's balance not increase by the difference between the proffered wage and the wages actually paid to the beneficiary in 2002 during that year, the ending balance in 2002 was less than the ending balance in 2001.

The fact that the beneficiary did not work for the petitioner for the full twelve months in either 2001 or 2002 is not relevant. Our concern in this matter is not whether the petitioner failed to fulfill its obligation, but whether it had the funds to pay the full proffered wage specified on the labor certification. The petitioner has not established that it paid wages to a temporary employee during the time that the beneficiary was abroad. Thus, the petitioner has not established that those funds would have been available to pay the full proffered wage as of the priority date.

The letter purportedly from [REDACTED], Senior Payroll Specialist for [REDACTED], is unsigned and, thus, has no evidentiary value. Regardless, the letter asserts that [REDACTED] has been instructed to pay the beneficiary \$76,000 in 2004. This letter does not address the petitioner's ability to pay the proffered wage prior to that date.

Counsel's reliance on the income of Mr. [REDACTED], \$106,700 in 2001, \$103,200 in 2002 and \$46,500 in 2003, is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Moreover, the payments to Mr. [REDACTED] represented funds already expended by the petitioner. Therefore, these expenses are not generally considered to be funds readily available to pay the proffered wage. As the petitioner is not hiring the beneficiary to replace Mr. Daruvuri, his wages are not a valid consideration.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002. Rather, the difference between the wages paid and the proffered wage was \$39,545 in 2001 and \$51,820 in 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the legacy Immigration and Naturalization Service (INS), now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that legacy INS should have considered income before expenses were paid rather than net income.

We agree with counsel that considering net income alone can be too restrictive. The director, however, also considered the petitioner's net current assets. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in questions, 2001 and 2002, however, were only \$1,548 and negative \$595 respectively, far less than the difference between the proffered wage and wages actually paid in those years, \$39,545 and \$51,820 respectively.

In summary, the petitioner has not demonstrated that it paid the full proffered wage. In 2001, the petitioner shows a net income of only \$10,983 and net current assets of only \$5,548, neither of which is sufficient to cover the difference between the proffered wage and the wages paid that year, \$39,545. In 2002, the petitioner shows a negative net income and negative net current assets, neither of which is sufficient to cover the difference between the proffered wage and the wages paid that year, \$51,820. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. For the reasons discussed above, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

ORDER: The appeal is dismissed.